

1992

State of Utah v. Charles Montgomery : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF UTAH

STATE OF UTAH, :
Plaintiff/Respondent, :
vs. : Priority No 14
CHARLES MONTGOMERY, : Supreme Court No. 920185
Defendant/Petitioner. :

BRIEF OF APPELLANT

A BRIEF ON CERTIORARI FROM A RULE 31 ~~HILLING~~ U.R.A.P.
FROM THE COURT OF APPEALS OF THE ~~STATE~~ OF UTAH

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IN THE SUPREME COURT OF UTAH

STATE OF UTAH, :

Plaintiff/Respondent, :

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CHARLES MONTGOMERY, : Supreme Court No. 920185

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IN SUPREME COURT OF UTAH

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
vs.	:	Priority No. 13
CHARLES MONTGOMERY,	:	Supreme Court No. 920185
Defendant/Appellant.	:	

BRIEF OF APPELLANT

JURISDICTION

This Court has jurisdiction over this appeal pursuant to U.C.A. §78-2-2(5). Defendant/Appellant appeals from the Order of Affirmance from the Utah Court of Appeals dated March 31, 1992.

ISSUE PRESENTED ON APPEAL

The issue presented on this appeal is whether or not an erroneous jury instruction is grounds for reversal regardless of whether or not an objection or lack thereof, to the instruction is on the court record.

Standard for review is outlined in State v. Bullock, 791 P.2d 155 at 158, (Utah 1989) defining the plain error test, when the record is void of an objection to a jury instruction.

DETERMINATIVE CONSTITUTIONAL PROVISIONS

Fourteenth Amendment, United States Constitution

Declaration of Rights, Article I, Section 7

Constitution of Utah

STATEMENT OF THE CASE, NATURE OF THE CASE, COURSE

OF PROCEEDINGS AND DISPOSITION AT TRIAL COURT

Petitioner, Defendant/Appellant below, was convicted of attempted manslaughter on December 4, 1990, and was sentenced to the Utah State Prison. On appeal to the Utah Court of Appeals, and without any request from either Petitioner or Respondent, the Court of Appeals considered the appeal pursuant to Rule 31, U.R.A.P. From an Order of Affirmance of the trial court's judgment denying a Motion for a New Trial and a Motion for Arrested Judgment, defendant petitioned this Court for Certiorari, which was granted on June 23, 1992.

STATEMENT OF FACTS

1. Defendant was convicted of attempted manslaughter on December 4, 1990 and was sentenced to the Utah State Prison for an indeterminate term of 0 to 5 years.

2. One of the jury instructions, Number 5, was aimed at instructing the jury on reasonable doubt. The trial court in formulating the jury instructions with the prosecution attorney, defendant's attorney and the court's own observations, stated in the record as contained in Addendum A.

3. No formal objection to that instruction as formulated by the court is contained in the record by either the prosecutor, defense counsel or the court itself.

4. Prior to sentencing and as indicated in the Statement of the Case, pre-sentencing motions were presented to the Court, which were denied, the principal motion contending that plain error had been committed entitling defendant to relief from the judgment of conviction based upon an erroneous reasonable doubt jury instruction.

SUMMARY OF THE ARGUMENT

Jury Instruction No. 5 in which the court used the terminology "more weighty and important matters relating to your affairs, you have no reasonable doubt" was in error and contrary to the State v. Johnson, 774 P.2d 1141 (Utah 1989) and State v. Pedersen, 802 P.2d 1328 (Utah 1990). The giving of an instruction containing that language is contrary to Cage v. Louisiana, 498 US, 112 L Ed 2d 339, 111 S.Ct.

ARGUMENT OF POINT ON APPEAL

JURY INSTRUCTION NO. 5 REGARDING REASONABLE DOUBT WAS ERROR AS A MATTER OF LAW AND CANNOT BE WAIVED

It is apparent to the writer, who was not involved in the trial of this case, that the trial court, the prosecutor and defense counsel were all unaware of State v. Pedersen, and Cage v. Louisiana, at the trial of this case. Addendum B

is the jury instruction which is the subject of the Petition for Certiorari. In State v. Pedersen, decided on December 13, 1990, "more weighty and important" was found to be error. Moral certainty and other terms were found prejudicial in Cage v. Louisiana, decided November 13, 1990.

The Attorney General's office has defended this appeal solely on the question of waiver by defense counsel by either failing to object and stating reasons for objecting to Instruction No. 5 or refraining from objecting to the trial court's own initiative in formulating the terminology of Instruction No. 5 on reasonable doubt. The Utah Court of Appeals stated in State v. Purdue, 813 P.2d 2101 (Utah App. 1991)

The Utah Supreme Court has emphasized that Rule 19(c) requires more than a general exception to the instructions. The rule "requires that the matter excepted to and the ground therefor be distinctly state." State v. Cantu, 750 P.2d 591, 594 (Utah 1988). Where no grounds are apparent from the text of the instruction and no objection is stated, the objection is presumed waived. State v. Dumas, 721 P.2d 502, 506 (Utah 1986). The exception to this general rule is that "[n]otwithstanding a party's failure to object, error may be assigned to instruction in order to avoid manifest injustice." Utah R.Crim.P. 19(c)

This position is clearly affirmed in State v. Bullock, 791 P.2d 155 (Utah 1989) pertaining to plain error. Retroactive application of changes in the law are to be considered by courts in determining the applicability of those changes to the case at hand. See State v. Anderton, 668 P.2d 1258 (Utah 1983).

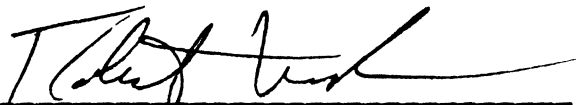
CONCLUSION

Defendant's argument on appeal is clearly outlined in the Petition for Certiorari and is again summarized in this brief. If any error existed at the trial court level regarding the propriety of the reasonable doubt jury instruction as given to the jury, the error was mutually indulged in by the trial court, the prosecution and defense counsel. It is clear that under State v. Pedersen, supra that "weighty and important" consideration by the jury in correlating what constitutes a reasonable doubt with their own personal life decisions is improper on its face. The defendant was deprived of and is still being deprived of his liberty by virtue of what is now perceived as clear error.

Based on the error in Jury Instruction 5, defendant seeks a reversal of his conviction.

RESPECTFULLY SUBMITTED this 2 day of July, 1992.


McRAE & DeLAND



ROBERT M. McRAE

CERTIFICATE OF MAILING

I hereby certify that I mailed, postage prepaid, four copies of the Brief of Petitioner to Mr. R. Paul Van Dam and Mr. David B. Thompson, Attorney General's Office, 236 State Capitol, Salt Lake City, UT 84114 this 2 day of September, 1991.



ROBERT M. McRAE

1 MR. WILLIAMS: IT'S THIS ONE.

2 MR. SOUVALL: OKAY. GOT IT NOW.

3 THE COURT: THEN LET'S ONLY COPY THOSE THAT WE
4 DON'T ALREADY HAVE COPIES OF, SO LET'S NUMBER THEM AS WE GO
5 ALONG.

6 NUMBER 2: "YOU ARE INSTRUCTED THAT DEFENDANT HAS
7 ENTERED A PLEA OF NOT GUILTY TO THE INFORMATION."

8 MR. SOUVALL: NUMBER 3?

9 THE COURT: NUMBER 2.

10 THE COURT: NUMBER 3 WILL BE, THE FACT THAT THE
11 DEFENDANT HAS BEEN CHARGED WITH A CRIME. NO. 4, THE DEFENDANT
12 IS A COMPETENT WITNESS IN HIS OWN BEHALF.

13 MR. SOUVALL: IT'S APPARENTLY BEEN LEFT OUT OF THE
14 COPIER.

15 THE COURT: THEN WE HAVE PROOF BEYOND A REASONABLE
16 DOUBT. IT'S A TWO-PARAGRAPH ONE. IT'S THE ONE THAT GOES,
17 "IT'S NOT ONE THAT IS NEARLY FANCIFUL OR IMAGINARY". IT'S THE
18 MORE EXPANDED ONE THAT WE HAVE USED.

19 MR. SOUVALL: THIS IS THE ONE THAT I OBJECTED TO ON
20 THE ELLIFRITZ TRIAL BECAUSE IT HAS THE WORD "SUBSTANTIAL" IN
21 IT. A REASONABLE DOUBT IS ONE THAT IS REAL AND SUBSTANTIAL.
22 I THINK SUBSTANTIAL IS WAY TOO STRONG OF A WORD TO DESCRIBE A
23 REASONABLE DOUBT.

24 THE COURT: I DON'T. THE MORE I HAVE THOUGHT ABOUT
25 IT THE MORE I THINK THAT IS PROBABLY THE BEST DESCRIPTION WE

1 CAN GIVE THEM. BUT I UNDERSTAND YOUR CONCERN. WHAT DO YOU
2 SUGGEST AS AN ALTERNATIVE?

3 MR. SOUVALL: DELETE THE SENTENCE. JUST, IT IS A
4 DOUBT BASED UPON REASON AND ONE WHICH REASONABLE MEN AND WOMEN
5 WOULD HAVE UPON A CONSIDERATION OF THE EVIDENCE. JUST DELETE
6 THAT BEFORE THE SEMICOLON.

7 THE COURT: YOU WOULD HAVE TO SAY A DOUBT,
8 REASONABLE DOUBT, AND IS A DOUBT BASED UPON..., "

9 MR. SOUVALL: YES.

10 MR. WILLIAMS: I WILL NOT GO OVER THE SUBSTANTIAL,
11 BUT I THINK I WOULD STILL WANT THE REAL LANGUAGE, A REASONABLE
12 DOUBT IS ONE WHICH IS REAL AND IS BASED UPON REASON.

13 THE COURT: REASONABLE DOUBT IS ONE WHICH IS REAL
14 AND IS BASED UPON...OKAY, HARRY?

15 MR. SOUVALL: THAT'S FINE. I WON'T OBJECT TO THAT.

16 THE COURT: A REASONABLE DOUBT IS ONE WHICH IS REAL
17 AND BASED UPON REASON AND ONE WHICH IS --

18 MR. SOUVALL: WHAT INSTRUCTION NUMBER WAS THAT?

19 THE COURT: 5.

20 THE COURT: NUMBER 6 IS, "YOU SHOULD CONSIDER
21 CAREFULLY ALL THE TESTIMONY..., " NUMBER 7 IS, "YOU ARE
22 INSTRUCTED THAT YOU ARE THE SOLE JUDGE OF THE FACTS OF
23 THE CREDIBILITY OF THE WITNESSES AND THE WEIGHT."
24 NUMBER 8, STATEMENTS OF COUNSEL. NUMBER 9, "IF IN
25 THESE INSTRUCTIONS ANY RULE DIRECTION OR IDEA..., "

INSTRUCTION NUMBER 5

Proof beyond a reasonable doubt is that degree of proof that satisfies the mind and convinces the understanding of those who are bound to act conscientiously upon it. A reasonable doubt is not one that is merely possible, fanciful, or imaginary, because almost everything related to human affairs is open to some possible doubt. A reasonable doubt is one which is real and is based upon reason and one which reasonable men and women would have upon a consideration of all the evidence. It must arise from the evidence or lack of evidence in the case.

If, after an impartial consideration and comparison of the evidence, you can honestly say that you are not satisfied of the Defendant's guilt, you have a reasonable doubt; but if after such impartial consideration and comparison of all the evidence you can truthfully say that you have an abiding conviction of Defendant's guilt such as you would be willing to act upon in the more weighty and important matters relating to your affairs, you have no reasonable doubt.

FILED

MAR 31 1992

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

Mary Noonan
Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

State of Utah,)
)
Plaintiff and Appellee,)
)
v.)
)
Charles Montgomery,)
)
Defendant and Appellant.)

ORDER OF AFFIRMANCE
Case No. 910284-CA

Before Judges Billings, Garff, and Jackson (Rule 31).

This case is before the court pursuant to Rule 31, Utah Rules of Appellate Procedure.

IT IS HEREBY ORDERED that the judgment is affirmed.

Dated this 31st day of March, 1992.

Judith M. Billings
Judith M. Billings, Judge

Reginal W. Garff
Reginal W. Garff, Judge

Norman H. Jackson
Norman H. Jackson, Judge